

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

UNITED STATES OF AMERICA,
STATE OF CONNECTICUT, and
COMMONWEALTH OF MASSACHUSETTS,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY,

Defendant

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)
)
) Civil Action Nos. 99-30225-MAP,
) 99-30226-MAP, and 99-30227-MAP
) (consolidated)
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**DEFENDANT'S REPLY TO THE UNITED STATES' RESPONSE TO DEFENDANT'S
MOTION FOR JUDICIAL REVIEW OF ENVIRONMENTAL PROTECTION
AGENCY'S DECISION IN DISPUTE REGARDING COST REIMBURSEMENT**

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INTRODUCTION AND STANDARD OF REVIEW

This is a dispute over the terms of the Pittsfield/Housatonic River Consent Decree (“Decree” or “CD”) that was entered in October 2000 by this Court, which retains jurisdiction to construe and effectuate its terms. CD ¶ 211. The Decree was the result of arms-length negotiations among the parties, including the General Electric Company (“GE”) and the U.S. Environmental Protection Agency (“EPA”), and it is settled and accepted that it is to be interpreted like a contract. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *AMF, Inc. v. Jewett*, 711 F.2d 1096, 1100 (1st Cir. 1983).

As demonstrated in GE’s opening memorandum (“GE Mem.”), a plain reading of the Decree shows that EPA is not entitled to recover the costs in dispute from GE. To avoid that result, the United States tries to wrap itself in the judicial deference that courts have allowed governments in so-called “public law litigation.” Response of the United States to GE’s Motion (“U.S. Resp.”) at 9-10. Those cases, however, are inapposite, and the United States – like any other party arguing the meaning of a contract – is entitled to no deference at all. This dispute is not “public law litigation,” a label that defines “federal court litigation in which the plaintiff has brought suit seeking to change the policies and administration of a branch of local government. Such suits result in the federal court attempting to remedy the violation of statutory or constitutional law by ordering affirmative changes in the administration of the particular branch of government or institution.”¹ This motion seeks only the Court’s application of the Decree’s provisions to resolve a dispute over the recoverability of costs pursuant to that Decree, and as such is indistinguishable from “garden variety . . . contract litigation” that involves “payment of money

¹ Ronald T. Gerwatowski, “Standing and Injunctions: The Demise of Public Law Litigation and Other Effects of Lyons,” 25 Boston College Law Review 765 (1984).

damages.” *AMF, supra*, 711 F.2d at 1101.² There is no reason why this Court should deviate from the standard of review that is generally applied to contract interpretation.³

There are only two questions raised by GE’s motion. First, do the disputed costs demanded by the United States fall within one of the capped cost categories in the Decree? Alternatively, were the disputed costs incurred outside of the Decree, rather than pursuant to its terms? If the answer to *either* of these questions is “yes,” then EPA may not recover those costs from GE. That is the case here, and so this Court should grant GE’s motion and order EPA to revise its Fiscal Year (“FY”) 2011 cost bill.

First, the costs in dispute clearly fall within one or more of the specifically defined capped cost categories in the Decree. Although the United States now asserts that the disputed costs were incurred to prepare a proposed remedy for the “Rest of River” area, EPA’s activities were clearly part of its efforts to **review and evaluate** potential alternative remedies, including the alternatives

² The United States relies on cases that only reinforce the difference between this dispute and true public law litigation. *Mass. Ass’n of Older Ams. v. Comm’r of Pub. Welfare*, 803 F.2d 35, 36 (1st Cir. 1986), involved a broad challenge to “the Massachusetts Department of Public Welfare’s practice of automatically terminating a person’s Medicaid benefits when his or her Aid to Families with Dependent Children (AFDC) or Supplemental Security Income (SSI) benefits were terminated.” *See also AMF, supra*, 711 F.2d at 1101, citing *Massachusetts Ass’n for Retarded Citizens, Inc. v. King*, 668 F.2d 602, 604 (1st Cir. 1981), which involved an allegation that “conditions at the institutions [for the mentally disabled] were constitutionally and statutorily inadequate.”

The United States’ reliance on *United States v. Charter Int’l Oil Co.*, 83 F.3d 510 (1st Cir. 1996), is also misplaced. That case involved the court’s approval of a proposed consent decree. The court accepted EPA’s interpretation of the consent decree after it determined that the decree would be “disapproved as contrary to the public interest” if the court adopted Charter’s interpretation. *Id.* at 517. Here this Court has already determined that the Decree – including its provisions placing caps on recoverability of EPA costs – is in the public interest. The United States’ suggestion that the deference it received respecting entry of the Decree should be extended to this cost dispute is unsupported.

³ EPA has not even provided a reasoned administrative decision for the Court to review, offering no more than a terse statement from the Agency decisionmaker that he agrees with the advocacy positions advanced by staff. GE Mem. Att. F. *See* GE Mem. at 9, citing *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 212 (1988) (no deference to agency litigating positions unsupported by regulations, rulings, or administrative practice).

evaluated by GE in its Revised Corrective Measures Study (“CMS”) and those developed by EPA itself. That is in fact how EPA characterized its activities at the time, as EPA stated repeatedly throughout FY 2011 that it had made no decision regarding a proposed remedy and was still evaluating all alternatives. Thus, EPA’s costs were incurred for “reviewing” GE’s Revised CMS Report and/or “conducting shadow or supplemental studies” for GE’s CMS, whose very purpose was to evaluate remedial alternatives. Such costs expressly fall within the capped category of “U.S. Oversight Costs” in the Decree. Alternatively, certain costs were incurred in connection with an internal EPA “peer review” or other studies done to support preparation of a remedy, which fall within the capped category of “U.S. Future Rest of River Capped Response Costs.”

Second, even if this Court were to find that EPA was already preparing documentation for a proposed remedy during FY 2011 as the United States contends, then the costs of that work would still not be recoverable as uncapped U.S. Future Response Costs because the costs were not incurred “pursuant to the provisions of the Consent Decree.” The Decree establishes a sequential process in which: (1) GE would conduct the CMS to evaluate potential alternative remedies for the Rest of River, including any alternatives that EPA asked GE to evaluate; (2) EPA would then approve or disapprove the CMS Report, which could include directions for GE to revise or supplement the CMS; (3) GE could make any required changes or dispute EPA’s decision; and (4) then, and only then, when the CMS Report is actually final, EPA would proceed to select a proposed remedy from the collection of remedial alternatives. Yet, EPA did not act on GE’s Revised CMS Report in FY 2011 and still has not done so. As a consequence, if EPA already started to document a proposed Rest of River remedy, it did so outside the process established by the Decree and cannot recover the costs of its premature actions.

ARGUMENT

I. Most of EPA's Billed Costs Fall within the Capped Categories of Either U.S. Oversight Costs or U.S. Future Rest of River Capped Response Costs and Thus May Not Be Recovered Under the Decree.

A. Overview

The United States concedes that if any of the disputed costs fall within a capped cost category under the Decree, such as U.S. Oversight Costs or U.S. Future Rest of River Capped Response Costs, those costs may not be recovered, because EPA's costs in those categories have already exceeded the bargained-for caps. As a threshold matter, EPA claims that substantial amounts of its FY 2011 costs have already been allocated to those capped categories. U.S. Resp. at 2-3. Of course, EPA's proper categorization of *some* of its costs is irrelevant to the categorization of the disputed costs, and the disputed costs do fall into capped categories.⁴

The bulk of EPA's \$1.2 million in disputed costs were plainly for reviewing and evaluating potential remedial alternatives for the Rest of River. That is shown best by EPA's own contemporaneous statements. EPA repeatedly stated throughout FY 2011 that it had made no decision on a proposed remedy for the Rest of River and was continuing to evaluate the alternatives and analysis in GE's Revised CMS Report, as well as EPA's "own" alternatives. *See* EPA's statements quoted in GE Mem. at 12-13. Even well after the end of FY 2011, EPA stated that, while it had developed a tentative remedial alternative, "no remedy decisions have yet been made," and that tentative alternative is "subject to further information that *will be reviewed as part of the consideration of the CMS.*"⁵ Thus, both during FY 2011 and thereafter, the Agency was continuing to review the Revised CMS and other alternatives. Given this context, EPA's activities

⁴ To facilitate the Court's review, GE has summarized the issues in chart form. *See* Exhibit A.

⁵ EPA's Housatonic River Status Report (May 18, 2012) (GE Mem. Att. G) at 1, 4 (emphasis added).

in seeking community input through the “Situation Assessment,” public workshops, and “Charrette” in the spring of 2012 and seeking peer advice from its internal National Remedy Review Board (“NRRB”) in the summer of 2012, along with employee time charged to “remedy preparation,” must have been part of EPA’s evaluative process.

The United States’ argument that these activities do not fall into any capped category flies in the face of the plain language of Paragraphs 4 and 22 of the Decree. In Paragraph 4, the Decree defines U.S. Oversight Costs to cover “all costs” incurred by EPA “in conducting the following activities: . . . (d) *reviewing proposals, reports, studies and other deliverables submitted by [GE]* under the . . . RCRA Permit, *conducting shadow or supplemental studies for the studies to be conducted by [GE]* under that Permit, and otherwise overseeing [GE’s] activities under that Permit, all prior to the modification of that Permit to select the Rest of River Remedial Action.” CD ¶ 4 (emphases added).⁶ EPA’s evaluation of remedial alternatives falls into this category. Under the structured process established in Paragraph 22 of the Decree and the associated RCRA Permit for remedial decision-making for the Rest of River, the parties agreed that **GE** would perform the study to evaluate the remedial alternatives (*i.e.*, the CMS);⁷ that EPA would then review and approve, conditionally approve, or disapprove the CMS Report; and that based on that evaluation, EPA would select a proposed remedy. CD ¶¶ 22.k, 22.n; Permit Special Conditions

⁶ The relevant provisions of the Decree are provided in GE Mem. Att. A; and a copy of the associated RCRA [Resource Conservation and Recovery Act] Permit is provided in GE Mem. Att. B.

⁷ It cannot be disputed that GE conducted the CMS and prepared the CMS Report and Revised CMS Report solely to evaluate remedial alternatives (referred to in the RCRA Permit as potential “corrective measures”). See Permit Special Conditions II.E, II.G. See also GE’s “Housatonic River - Rest of River Corrective Measures Study Proposal” at 1-1 (“This Corrective Measures Study (CMS) Proposal presents the proposal of [GE] for a study of potential corrective measures” in the Rest of River), available at <http://www.epa.gov/region1/ge/thesite/restofriver/reports/260320.pdf>; GE’s “Housatonic River – Rest of River, Revised Corrective Measures Study Report” at 7 (October 2010) (“This Revised CMS Report presents the results of a detailed evaluation of a range of remedial alternatives, approved by EPA for evaluation...”), available at <http://www.epa.gov/region1/ge/thesite/restofriver/reports/cms/472605.pdf>.

II.F, II.G, II.H, II.J. Thus, EPA’s prescribed role under this process is to *review* GE’s evaluation of alternatives and make a decision on it. EPA did reserve the right to undertake “any studies it deems necessary for the Rest of the River to shadow or supplement studies undertaken by [GE]” (CD ¶ 22.I), which necessarily could include its own evaluation of remedial alternatives. While EPA might thus choose to conduct its own supplemental evaluations while it considered GE’s CMS Report, the Decree explicitly provides that EPA would *not* have a blank check if it chose to do its own evaluations, rather than rely on the CMS. Instead, the parties agreed that EPA’s costs of such “shadow or supplemental studies” would be capped as part of U.S. Oversight Costs.

The language used to define the sole uncapped U.S. Future Response Costs category supports this result. The only Rest of River costs mentioned in that category are costs incurred for “preparing, reviewing, and approving the documents that propose and select the Rest of River Remedial Action (including responding to public comments thereto).” CD ¶ 4. Seeking to avoid the very specific definitions of capped and uncapped costs, the United States argues that U.S. Future Response Costs is a “catch all” that includes any costs that are not included in a capped category. U.S. Resp. at 4. That argument ignores much of the language of the definition of U.S. Future Response Costs, which carefully enumerates various specific types of costs that fall within that category. That enumeration must be given effect because it shows the parties’ intent regarding the types of costs covered by this uncapped category, particularly *in contrast* to the costs listed in the capped categories. Thus, the specific enumeration that uncapped costs include the costs of “preparing, reviewing, and approving the [remedy proposal] documents” demonstrates that EPA’s necessarily earlier *evaluation* of remedial alternatives for the Rest of River was *not*

intended to be included in the category of U.S. Future Response Costs, but would fall within a capped category.⁸

The United States suggests that because EPA had developed its own tentative “preferred alternative,” EPA’s evaluations somehow could not be part of its “oversight,” the costs of which are capped U.S. Oversight Costs. U.S. Resp. at 17. This cramped reading of the Decree should be rejected. Developing and seeking input on a “preferred alternative” still is part of EPA’s evaluation of alternatives, *not* the documentation of a proposed remedy which, as EPA said repeatedly, had not yet been decided upon.⁹ Further, the definition of U.S. Oversight Costs is broader than just “overseeing” GE’s work, but expressly includes EPA’s “review” of GE’s submittals and EPA’s performance of “shadow or supplemental studies.” Indeed, the United States itself claims that “‘review’ means ‘to examine or study again;’ ‘to go over or examine critically or deliberately,’” U.S. Resp. at 17. The evaluation of any remedial alternative falls within this definition. Regardless, EPA’s activities *do* constitute “oversight,” as it was GE’s task under the Decree to identify and evaluate remedial alternatives in the CMS, and thus EPA’s review or re-doing of such evaluations amounts to overseeing GE’s required activities.¹⁰ Accordingly, the costs of those activities are capped U.S. Oversight Costs.

⁸ We also note that *all* of the cost category definitions, not just the definition of U.S. Future Response Costs, exclude all costs that fall into other categories. CD ¶ 4

⁹ It should be noted that EPA’s so-called “preferred alternative” in fact consisted of a combination of elements derived largely from the alternatives in the Revised CMS Report. See EPA’s description of its “preferred alternative” in its Site Information Package presented to the NRRB in June 2011 (relevant excerpt attached as Exhibit B).

¹⁰ If EPA had followed the process described in the Decree, it could have taken final action on GE’s Revised CMS Report and, with the suite of alternatives defined, moved on to the remedy-selection phase. EPA did not do that, and chose instead to leave open the evaluation of alternatives, and so it cannot complain that its costs fall within the category reserved for evaluating alternatives.

In the alternative, these EPA activities fall within the definition of U.S. Future Rest of River Capped Response Costs. EPA quotes selectively from that definition by asserting that costs in this capped category are “specifically limited to ‘*field work* to support the preparation, development, and selection’ of the Remedy.” U.S. Resp. at 16 (emphasis in original). In fact, the definition of this category covers “all costs” incurred by EPA “in connection with studying or otherwise investigating the Rest of River **and/or** all field work to support the preparation, development, and selection” of the remedy. CD ¶ 4 (emphasis added). In other words, it covers costs related to **either** studies **or** field work to support remedy preparation. Moreover, the fact that this definition explicitly includes “peer input” and “peer review” (CD ¶ 4) shows that costs “in connection with studying” the Rest of River to support remedy preparation were intended to extend broadly to cover obtaining such “peer input” or “peer review,” such as the NRRB review.

The United States focuses on the phrase “non-field work” as modifying the phrase “preparing, reviewing, and approving the [remedy proposal and selection] documents” in the definition of U.S. Future Response Costs and argues that the activities at issue here fall within that uncapped category. U.S. Resp. at 13. That does not follow. This reference simply makes clear that the uncapped U.S. Future Response Costs category was **not** intended to cover field work to support the preparation, development, and selection of the remedy, which, as noted above, is covered by the U.S. Future Rest of River Capped Response Costs category. It does not change the coverage of either the capped or uncapped cost categories.

With these points in mind, we turn to the specific categories of costs in dispute here.

B. Situation Assessment, Workshops, and “Charrette” (\$418,560)

As the United States admits, the purpose of the Situation Assessment, public workshops, and “Charrette” was to “inform[] the public, and consider[] community input, regarding the ROR

[Rest of River] and potential ROR cleanup alternatives,” so as “to inform EPA’s selection of a preferred Remedy.” U.S. Resp. at 7, 20. The United States contends that these community outreach efforts are not covered by U.S. Oversight Costs, arguing that they were not part of EPA’s review of GE’s Revised CMS Report, but rather were taken to “facilitate EPA’s decision-making regarding a preferred Remedy.” It also argues that these activities were not shadow or supplemental studies for GE’s studies, since GE was not required “to conduct any studies of the community’s views.” *Id.* at 22 & 23.

This *post hoc* rationalization misses the point. These activities were part of EPA’s continuing evaluation of the CMS alternatives as well as other potential alternatives. Although the Government states that these activities were somehow part of a “separate task, namely the task of developing a preferred alternative” (*id.* at 33), it is clear that they were not taken to obtain public input on an already-selected preferred alternative, given EPA’s repeated *contemporaneous* statements that it had not yet selected a preferred alternative and was evaluating *all* alternatives. Rather, these activities involved gathering community input regarding various “potential ROR cleanup alternatives” so as, in the Government’s words, “to inform EPA’s selection of a preferred Remedy” *Id.* at 7 & 20. For example, during the Charrette, EPA presented four of the remedial alternatives described in GE’s Revised CMS Report, and asked participants to evaluate those alternatives to assist EPA in its evaluation.¹¹ The gathering of community input to inform EPA’s *later* selection of a preferred alternative was necessarily part of EPA’s evaluation of alternatives.¹²

¹¹ See GE Mem. Att. J.

¹² The United States notes that EPA guidance encourages early public outreach. U.S. Resp. at 8 & n.8. That does not in any way change the *purpose* of the outreach. The fact remains that the extensive and, to our knowledge, unprecedented outreach efforts conducted by EPA here were part of EPA’s evaluation of remedial alternatives to assist EPA in selecting a preferred alternative.

For the reasons given in Section I.A above, these evaluative activities were either part of EPA's "review" of the Revised CMS Report or the conduct of "shadow or supplemental studies" for GE's CMS, rather than the document preparation activities listed under U.S. Future Response Costs. That GE was not required to obtain the community's views on remedial alternatives as part of the CMS is of no moment. EPA's extensive public outreach effort was still part of its evaluation of alternatives; and since evaluating alternatives was the purpose of the CMS, EPA's evaluation (with whatever input it chose to obtain) was necessarily a shadow or supplemental study for the CMS within the definition of U.S. Oversight Costs. Indeed, the U.S. Oversight Costs definition specifically mentions "community relations costs." CD ¶ 4.¹³

C. Review by EPA's NRRB (\$366,930)

EPA spent more than \$366,000 conducting an internal peer review of Rest of River remedial alternatives by the NRRB (which included members of the Contaminated Sediments Technical Advisory Group). The United States argues that the costs of this peer review are not covered by a capped cost category because the purpose of that review was to "review [EPA] Region I's recommendation of a preferred Remedy" (U.S. Resp. at 17), and not to study the Rest of River, review GE's CMS, or conduct a shadow or supplemental study for GE's studies (*id.* at 15-19).

This contention conflicts with EPA's own contemporaneous statements. The NRRB review was conducted to obtain the advice of an internal EPA peer group on EPA's evaluation of alternatives. This review included the alternatives in GE's Revised CMS Report, as shown by the fact that EPA encouraged stakeholders to "submit written comments ... *on the [Revised] CMS for*

¹³ The United States asserts that this reference includes only those community relations costs for the activities covered by the definition of U.S. Oversight Costs. U.S. Resp. at 23-24. That assertion supports GE's position since, as discussed above, that definition covers EPA's evaluation of remedial alternatives.

*[N]RRB consideration.”*¹⁴ Moreover, the Region’s Site Information Package presented to the NRRB in June 2011 contained a lengthy description and “comparative analysis” of the alternatives presented in the Revised CMS Report.¹⁵ While the NRRB’s review also included the Region’s “preferred alternative,” that was still an evaluation of a remedial alternative. As previously discussed, EPA’s evaluation of remedial alternatives, with whatever input EPA chose to obtain, was a shadow or supplemental study for GE’s Revised CMS, whose purpose was to evaluate remedial alternatives. Thus, the costs fall into the category of U.S. Oversight Costs.

Alternatively, the NRRB review costs are covered by U.S. Future Rest of River Capped Response Costs. As outlined above, this category covers the costs incurred in connection with *either* studies *or* field work¹⁶ to support the preparation, development, and selection of a remedy. The United States claims that the NRRB “was not studying or investigating the [Rest of River].” U.S. Resp. at 16. However, both GE’s Revised CMS Report and the Region’s analyses submitted to the NRRB were studies of the Rest of River, and the NRRB costs were incurred “in connection with” those studies. CD ¶ 4. Moreover, when listing the kinds of studies that would be covered by this capped cost category, the Decree explicitly includes “peer input” and “peer review.” *Id.* EPA has explained that NRRB review is EPA’s “internal peer review process,” which precedes EPA’s selection of a remedy proposal.¹⁷ Thus, the NRRB’s “peer input” or “peer review” fits within the definition of U.S. Future Rest of River Capped Response Costs.

¹⁴ GE Mem. Att. C, Ex. E at 6 (emphasis added).

¹⁵ See GE Mem. Att. K at vi-ix.

¹⁶ Hence, the United States’ focus on “field work” is misplaced. *E.g.*, U.S. Resp. at 16.

¹⁷ See GE Mem. Att. C, Ex. C at 8 (remarks of EPA Regional Section Chief Bob Cianciarulo).

D. EPA Employee Time (\$147,044)

The United States asserts that almost \$150,000 in EPA employee time that was charged to “Remedy preparation” was properly allocated to U.S. Future Response Costs. U.S. Resp. at 24. That argument also fails. Given EPA’s insistence throughout FY 2011 that it had made no decision regarding a proposed remedy for the Rest of River and was continuing to evaluate the Revised CMS and other alternatives, the employee time in question must have been spent in evaluating the Revised CMS alternatives, in developing and evaluating EPA’s “own” alternative, and in supporting public outreach (workshops, Charrette) and EPA’s peer review (NRRB review). None of these is “remedy preparation” and each of them falls within the definitions of the capped cost categories. Moreover, to the extent that that time was in fact spent in developing proposed remedy documents, it was not incurred “pursuant to the provisions of” the Decree, for the reasons discussed in Section II below.

E. DOJ Activities (\$87,000)

The United States contends that EPA properly included \$87,000 in Department of Justice (“DOJ”) costs in its FY 2011 bill because the definition of U.S. Future Response Costs is the only cost category that refers to “DOJ” costs, whereas the definitions of other cost categories refer only to “EPA” costs. U.S. Resp. at 22. Hence, the United States argues, all DOJ costs are recoverable under the uncapped category.

That contention completely misses the mark. For one thing, EPA itself treats DOJ costs as EPA’s costs. Costs incurred by DOJ are reimbursed by EPA under an “interagency agreement” between EPA and DOJ, and EPA treats those costs like any other costs that *EPA incurs*, including costs that EPA pays under other interagency agreements.¹⁸ Specifically (as shown in GE Mem. at

¹⁸ See GE Mem. at 19-20 and Att. L.

20 n.27), EPA adds on top of the DOJ charges an additional 32% in *EPA* “indirect” (overhead) costs, as EPA does for all other costs, even though the DOJ costs include their own indirect costs.¹⁹

Moreover, the Government’s reading is contrary to the language in the cost definitions in the Decree. U.S. Oversight Costs (like the other capped cost categories) includes “*all* costs” incurred by EPA that fall within the category, *including* “interagency ... agreement costs.” CD ¶ 4 (emphasis added). Under the Government’s position, if DOJ were performing an activity that falls squarely within one of the capped cost categories (such as reviewing a GE deliverable), its costs would nevertheless not be capped. That is not what the parties agreed.

Thus, to the extent that the DOJ costs were incurred for the types of activities that would fall within the definitions of U.S. Oversight Costs or U.S. Future Rest of River Capped Response Costs, they are covered by those capped cost categories.²⁰

F. Citizens’ Coordinating Council Activities (\$22,080)

The United States argues that the \$22,000 that EPA paid to a contractor to coordinate the Citizens’ Coordinating Council (“CCC”) meetings were properly allocated to U.S. Future Response Costs. U.S. Resp. at 26. It now says these are not U.S. Oversight Costs because the “primary purpose” of the CCC meetings was “to provide information regarding the work to the

¹⁹ DOJ’s FY 2011 indirect cost rate was approximately 185% (*see Exhibit C*), and EPA applied its FY 2011 overhead rate of 32.84% on top of DOJ’s already marked-up costs (*see* GE Mem. Att. L at 1). The result is that for every \$1.00 of actual DOJ direct costs, EPA has billed GE almost \$3.80 – nearly a 4-times multiplier.

²⁰ The United States also argues the Decree does not require EPA to further document DOJ costs. U.S. Resp. at 25. The minimum documentation requirement is irrelevant, since it simply establishes the documentation needed to “establish the amounts incurred.” CD ¶ 100.h. However, the Government must still establish that the costs it is seeking are recoverable, as it cannot recover costs exceeding the cost caps or in the wrong cost category. CD ¶ 101.

public, including the status of the [Rest of River] and other Site cleanups,” and thus EPA was not reviewing or otherwise overseeing GE’s work at the Site. *Id.*²¹ Again, this argument fails.

The activities that involved providing information to the public and obtaining public input regarding the Rest of River remedial alternatives are “community relations” activities within the U.S. Oversight Costs category for the same reasons discussed above for the Situation Assessment, public workshops, and Charrette (see Section I.C above).²² As noted, U.S. Oversight Costs include “all costs” including “community relations costs” incurred by EPA while “conducting” its review of the remedial alternatives. CD ¶ 4.

Moreover, while other topics were also addressed in the CCC meetings, the costs associated with those also fall within U.S. Oversight Costs. These other topics concerned GE’s other cleanup activities under the Decree, such as “Remediation Projects in Pittsfield,” that relate to “Removal Actions Outside the River,” which fall under other prongs of the U.S. Oversight Costs definition. *See* GE Mem. at 21. U.S. Oversight Costs include “all costs,” including “community relations costs,” incurred in “otherwise overseeing” GE’s compliance with Decree requirements regarding such Removal Actions. CD ¶ 4. Hence, the CCC costs relating to these topics should be allocated to that capped category. If these costs are not easily divisible among the different categories, then they should be allocated among cost categories via the cross-cutting methodology. CD ¶ 100.f (which provides for allocation of “costs Incurred in support of tasks included in more than one cost category”).

²¹ The Government has shifted its position in this proceeding. EPA previously had stated that those costs either “related to remedy preparation” or were incurred to develop plans or reports pursuant to Decree provisions that do not fall within the capped cost categories. EPA Statement of Position in administrative dispute resolution proceeding (U.S. Resp. Ex. 6) at 10.

²² The agendas and meeting minutes from the CCC itself (summarized in GE’s letters to EPA, *see* GE Mem. at 21) demonstrate that significant time related to Rest of River activities.

G. Cross-Cutting Costs (\$106,830)

In its opening memorandum, GE explained that these costs consist of a portion of EPA's general project costs that EPA has allocated to U.S. Future Response Costs based on an established formula; and it noted that the Court should direct EPA, based on the reductions discussed above, to re-calculate the cross-cutting costs (using its established formula). GE Mem. at 21. The United States agrees that "[i]f this Court determines that any costs were improperly allocated to Future Response Costs, EPA will re-calculate cross-cutting costs accordingly and based upon this formula." U.S. Resp. at 29 n.34

II. To the Extent That EPA's Costs Were Incurred for Preparing, Developing, and Reviewing a Remedy Proposal, They Were Not Incurred Pursuant to the Sequential Process Expressly Provided for in the Consent Decree.

Even assuming that the Rest of River costs included in the FY 2011 bill were incurred "for preparing, reviewing, and approving the documents that propose" a Rest of River remedy, the costs are still not recoverable as U.S. Future Response Costs. GE Mem. at 21-23. This is because EPA has *not* incurred the costs "pursuant to the provisions of this Consent Decree" – *i.e.*, in accordance with the sequential process established in the Decree, which required EPA to act on GE's Revised CMS Report before selecting and preparing a proposed remedy. The United States argues that nothing in the Decree prohibits EPA from initiating the remedy selection process before acting on the Revised CMS Report and that doing so is consistent with EPA regulations and guidance and promotes efficiency. U.S. Resp. at 30-35. This argument is unavailing.

Paragraph 22 of the Decree mandates that "selection of a Remedial Action for the Rest of the River *shall be conducted* in accordance with the Reissued RCRA Permit and the provisions of Paragraph 22" (emphasis added). Paragraph 22.n provides that EPA will issue its proposed remedy only upon "satisfactory completion of the CMS Report in accordance with the Reissued

RCRA Permit.” The United States asserts that this provision applies only to EPA’s actual *proposal* of a remedy, and does not expressly preclude EPA’s initiation of the remedy selection process. U.S. Resp. at 31. However, that contention ignores the fact that this provision is part of an overall, carefully negotiated sequential approach that requires completion of the CMS process before EPA develops a remedy proposal. To interpret the Decree as giving EPA the unfettered authority to develop a remedy proposal whenever it wants to and to spend whatever it costs to do so would be flatly inconsistent with that agreed-upon approach.²³

The Consent Decree and the Permit establish a series of defined steps for decision-making regarding the Rest of River. *See* GE Mem. at 3-4. These steps include GE’s performance of the CMS and submission of a CMS Report, followed by EPA’s review and approval, conditional approval or disapproval of that report (and if disapproved, modification of the report), followed by EPA’s issuance of a remedy proposal. *See* CD ¶¶ 22.k & 22.n; Permit Special Conditions II.F, II.G, II.H, II.J. These provisions clearly contemplate that each step will be completed before proceeding to the next step – specifically, that the CMS process will be completed, including EPA’s action on the CMS Report, before EPA selects and develops a proposed remedy (not simply before it issues a remedy proposal). This is further supported by the fact that the Decree and the Permit provide GE with the right to administrative dispute resolution to challenge any EPA decision on the CMS Report. CD ¶ 141.a; Permit Special Condition II.N. That right would be effectively meaningless if EPA had already developed its own remedy proposal and could

²³ The United States asserts that “technical questions, such as the proper process for selecting a remedy, are within EPA’s technical expertise to which courts typically defer.” U.S. Resp. at 31 n.36. This assertion is groundless misdirection, since the question here is not “the proper process for selecting a remedy” in the abstract, but whether EPA has followed the process *required by “the provisions of this Consent Decree”* before incurring and charging GE for remedy preparation costs. That is a question involving the meaning of the parties’ contract, on which a reviewing court owes no deference to the interpretation offered by one party over another. *See* GE Mem. at 8-9 and pp. 1-2, *supra*.

recover the costs of doing so from GE, regardless of the outcome of any later dispute resolution. Rather, since the dispute resolution outcome could affect the evaluation of alternatives and thus the remedy proposal, it must be completed before EPA decides on a remedy.

Following this sequential process is essential to ensure effectuation of the approach that the parties agreed upon in the Decree – that the CMS Report would provide a basis for the remedy selection,²⁴ and that GE would have a meaningful opportunity to dispute EPA’s decision on that report before it was finalized. For EPA to select and develop a remedy proposal before acting on the CMS Report would represent a pre-judgment that would undermine those purposes. EPA’s suggested interpretation would allow it to put the CMS Report on the shelf, and come up with its own alternatives and evaluations. Under the United States’ open-ended argument, EPA could begin working on a remedy proposal at any time, even before submission of the CMS Report. That would thwart the objective of the CMS to provide a basis for the remedy proposal and would read out of the Consent Decree the agreed-upon sequential framework for choosing the remedy.²⁵

To support its position, the United States also cites a number of EPA guidance documents under the Resource Conservation and Recovery Act (“RCRA”), as well as certain regulations and guidance under the Comprehensive Environmental Response, Compensation, and Recovery Act (“CERCLA”), which it says provide flexibility for EPA to initiate the remedy selection process at

²⁴ This does not mean that EPA must agree with GE’s conclusions and recommendations in the CMS Report, but it does mean that the information and evaluations in a final, approved CMS Report are to provide the necessary foundation for the remedy proposal. That is shown by the fact that the Permit imposes detailed requirements for the CMS Report, including the information that must be provided and specific criteria that must be evaluated for each remedial alternative. Permit Special Condition II.G.

²⁵ The United States points out that, in the spring of 2012, GE asked EPA to participate in technical discussions regarding a potential Rest of River remedy and did not insist that EPA act on the Revised CMS Report beforehand. U.S. Resp. at 2, 9, 34. In addition to the fact that that development did not occur in FY 2011 (and thus is not relevant here), it simply shows that GE wanted to discuss potential remedies with EPA before EPA *either* acted on the Revised CMS Report *or* decided on a proposed remedy. This is hardly surprising given EPA’s decision to shelve the Revised CMS Report.

an early stage and even note that a CMS may not be necessary in some cases. U.S. Resp. at 32-33. Those references are irrelevant given that *in the Consent Decree for this Site* the parties agreed upon the specified sequential process described above to ensure that, *in this case*, EPA would issue a decision on the CMS Report and GE would have a meaningful opportunity to dispute that decision before EPA proceeded to decide upon and prepare a proposed remedy.²⁶ Indeed, this sequential approach is consistent with EPA's statements describing the process that it understood it was actually following. See, e.g., EPA 2008 Presentation on CMS (GE Mem. Att. C, Ex. D), indicating that EPA will *first* "approve, conditionally approve, or disapprove the CMS) and *then* "develop[] preferred alternative for public comment." EPA should be held to the process that it negotiated and agreed upon in the Decree.

The United States asserts further that "EPA believes" that the process of developing a remedy proposal before acting on the Revised CMS Report is "more efficient." U.S. Resp. at 34. That is not for EPA to decide since the parties have agreed otherwise and the Court has endorsed that agreement. In any event, the process followed by EPA is itself *inefficient* in that it would largely waste the years of work and millions of dollars invested by GE in the CMS Report and Revised CMS Report, including making extensive revisions in response to EPA comments. That should not be countenanced by this Court.

²⁶ In any event, it should be noted that the United States' reference to EPA's CERCLA guidance is misleading. It quotes a sentence from *A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Documents* (1999) (Gov. Resp. Ex. 7) at p. 2-1, to the effect that "in some circumstances, a draft [proposed cleanup plan] can be developed as the RI/FS [Remedial Investigation/Feasibility Study, the CERCLA analog to the CMS] is being finalized." U.S. Resp. at 33 n.39. That quotation relates to the situation in which the lead agency (*i.e.*, EPA) is doing the RI/FS. The guidance states specifically that "[i]f a PRP [potentially responsible party] prepares the RI/FS, then the Proposed Plan should be drafted by the lead agency *after the lead agency approves the RI/FS*" (p. 2-1; emphases added). The latter sentence is more relevant here, where GE prepared the CMS Report (analogous to the RI/FS).

III. EPA's Records Management Costs Are Not U.S. Future Response Costs.

GE has separately challenged the EPA records management costs included in the FY 2011 bill (\$43,680). As discussed in GE's opening brief, these costs are not U.S. Future Response Costs, as they were not incurred pursuant to provisions of the Decree, were misallocated, and/or lacked sufficient documentation to establish their recoverability. GE Mem. at 24.

In response, the United States first argues that these costs were incurred under the Decree because paying a contractor to maintain records relates to "enforcing" the Decree, which is covered by U.S. Future Response Costs and which the United States asserts includes any actions "to carry out effectively" the Decree. U.S. Resp. at 27. This sleight of hand is not a reasonable reading of the Decree. As the parties could not estimate future enforcement costs, if any, the Decree allows the Government to recover as U.S. Future Response Costs those costs "*to enforce* the Consent Decree (including dispute resolution)." CD ¶ 4 (emphasis added). Thus, if the Government has "to enforce" the Decree, then it may recover its costs of that effort. To transform that narrow provision into any costs incurred "to carry out effectively" the Decree is not grounded in common sense and would gut the careful balance between capped and uncapped categories.²⁷

Second, the United States argues these costs do not fall within any cost category since the "central purpose" of records management does not meet the criteria in the capped costs definitions. U.S. Resp. at 28. This, too, is groundless and misreads the Decree. The capped cost categories cover "all" costs associated with a particular category. If the records being managed arise from work done pursuant to the Decree, then the costs associated with managing those

²⁷ Nor could many of the activities under this contract ever have anything to do with even a theoretical enforcement action. See GE Mem. Att. C, Ex. A at 11-12.

records should be charged to that cost category. If that is too burdensome, then the costs should be allocated using the cross-cutting methodology.

CONCLUSION

For the foregoing reasons, GE's motion should be granted in full.

Respectfully submitted,

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May 6, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May 2013, the foregoing Reply to the United States' Response to Defendant's Motion for Judicial Review of United States Environmental Protection Agency's Decision in Dispute Regarding Cost Reimbursement was filed through the Court's ECF system and was therefore sent electronically to the registered participants as identified on the Notice of Electronic Filing. In addition, copies of the foregoing document were sent by electronic or first-class mail to the following counsel on this 6th day of May 2013:

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LIST OF EXHIBITS

Description	Exhibit
Summary of Costs in Dispute	A
Excerpt from U.S. EPA, <i>National Remedy Review Board Site Information Package for the Housatonic River, Rest of River</i> (June 30, 2011)	B
DOJ Cost Summary	C